

MAHMOUD (Migration) [2019] AATA 2568 (26 June 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Ahmed Ezzat Shaaban MAHMOUD
CASE NUMBER:	1807654
HOME AFFAIRS REFERENCE(S):	CLF2014/20781
MEMBER:	Antoinette Younes
DATE:	26 June 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2)(a) of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations. •

Statement made on 26 June 2019 at 11:00am

CATCHWORDS

MIGRATION – refusal – Partner (Temporary) (Class UK) visa – Subclass 820 – substantial corroborative evidence provided– genuine and continuing relationship– credible witness– decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, rr 1.15A, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 10 February 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211 and cl.820.221 because the delegate was not satisfied that the applicant is the spouse of the sponsor, as defined under those provisions.
4. The matter was before the Tribunal (differently constituted) previously and on appeal, the Court remitted the matter to the Tribunal for reconsideration.
5. The applicant appeared before the Tribunal on 25 June 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Standard) and English languages.
6. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

BACKGROUND

10. The applicant who is an Egyptian national came to Australia in 2005 as the holder of a student visa and completed an Advanced Diploma of Business Management. In 2007, he married in Egypt and he has two children from that marriage. He divorced his former wife in mid-2011 and the two children have continued to live with their mother in Egypt. He has maintained regular contact with his children. The sponsor is an Australian citizen and she came to Australia from Lebanon in 1976. She was married previously and she has two adult daughters from that marriage.
11. The couple were introduced to each other through friends and within 3 to 4 months of their first meeting, they decided to get married in October 2013 when they went through a religious ceremony. On 9 January 2014, they married formally and continued to live together in a rented accommodation where they have lived since October 2013.
12. Both the delegate and the previous Tribunal were not satisfied that there was sufficient evidence to support a finding that the applicant met the criteria to be granted the visa. The couple attended a hearing before the Tribunal approximately three years after they appeared before the previous Tribunal on 27 June 2016. Since that time, they have provided substantial corroborative evidence. The Tribunal conducted the hearing and found both the sponsor and the applicant to be credible witnesses. The Tribunal had a number of concerns about the relationship, essentially relating to matters such as the timing of the marriage (3 to 4 months after they first met) and the age difference between the couple. The Tribunal is persuaded by the explanations provided.

Are the parties validly married?

13. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, the Tribunal is satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

- ***Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses***
14. The applicant has provided documents including bank statements of two bank accounts. One of the accounts is a Commonwealth Bank Smart Access account which was opened in January 2014, shortly after the couple married. They use this account for such things as rent payments, payment of the sponsor's salary, the applicant's income, regular household expenses, insurance expenses, etc. The other account is a business transaction account set up by the applicant and it shows income from students by name, and payments for the business including regular payments to the joint account.
 15. The parties do not own their own property due to the cost of purchasing property in Sydney.
 16. There is before the Tribunal evidence that the sponsor has nominated the applicant as one of her superannuation beneficiaries. The applicant has nominated the sponsor as his sole superannuation beneficiary.
 17. The Tribunal is satisfied that the financial aspects of the relationship support a finding that the relationship is genuine and continuing.

- ***Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.***

18. On the evidence before it, the Tribunal is satisfied that they have lived together since their marriage in 2013. Due to medical challenges, the sponsor and the applicant have not had any joint children. However they each have two children from previous marriages. The sponsor has met the applicant's children. The applicant has met members of the sponsor's family including her children who have provided statements in support of the couple.

19. In their statutory declarations to the Tribunal, the applicant and the sponsor further described the nature of their relationship.

20. The Tribunal has decided to place significant weight on the fact that the couple married in 2013 and they have lived together since then, providing support for the finding that the relationship is genuine and continuing.

- ***Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.***

21. The couple provided to the Tribunal substantial material including statutory declarations and form 888 from family and friends. They have met their respective children. In their signed form 888, the sponsor's daughters referred to the genuineness of the couple's relationship. They both contribute to the running of a teaching business. They represent themselves as being a married couple.

22. The Tribunal is satisfied that the social aspect of the relationship support a finding that the marriage is genuine and continuing.

- ***Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.***

23. In their statutory declarations as well as oral evidence, the applicant and the sponsor referred to their long-term relationship and of their intention to maintain it on a permanent basis. The applicant referred to his intention to build his business further and to purchase a joint property.

24. The sponsor has a business. Both he and the sponsor contribute their time and skills to the development of the business.

25. They both referred to the emotional support they provide to each other, including support which the applicant provided when the sponsor's brother died last year. They provide mutual companionship and emotional support.

26. On the evidence, the Tribunal is satisfied that the nature of their commitment to each other supports a finding that their relationship is genuine and continuing.

- ***Any other circumstances of the relationship.***

27. The Tribunal acknowledges that the couple married within 3 to 4 months of their first meeting and this might raise some doubts about the applicant's intention to marry; he was the holder

of a student visa at the time. Although it is plausible that there was such an intention, the fact that the couple has remained together since they married in October 2013 is highly persuasive evidence that their relationship is genuine and continuing.

28. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
29. Therefore the Tribunal finds that the applicant meets 820.211(2)(a) and cl.820.221.
30. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

31. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2)(a) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations.

Antoinette Younes
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).